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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 317

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRANCIS E. TOWER.

BRIEF OF TAXPAYER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE FACTS

The Tax Court made findings of fact on which we relied in the Circuit Court of Appeals. The Commissioner's petition sets forth most of the facts found by the Tax Court, but it omits one essential factor, viz., findings by the Tax Court that the partnership enterprise had gross assets used in the business of approximately $200,000; had an average steel inventory of approximately $50,000 and employed from 40 to 60 people (R. p. 16). These omitted facts and findings are important as showing that the partnership employed a very substantial capital in the production of income, as distinguished from a family partnership where the earnings result from the individual efforts of the husband.

REASONS FOR DENYING THE WRIT

The petition should be denied because:

1. It fails to bring up for review any specific legal question.
2. The decision in this case is not in conflict with any decision of any other Circuit Court of Appeals.
3. The decision in this case is not in conflict with any decision of, or legal principle laid down by, this Court.
4. This case was correctly decided by the Circuit Court of Appeals for the Sixth Circuit.

I.

No Specific Legal Question is Submitted For Review

A petition for writ of certiorari, if entitled to serious consideration, should bring up for review some specific and definite legal question. The petition before us fails to do so, and fails to meet the requirements of Rule 38 (5b) of this Court.

The Commissioner, on page 2 of his petition, states the "question presented" as being:

> "Whether the Circuit Court of Appeals erred in reversing the Tax Court's decision that there was not in substance a contribution of capital to the business by taxpayer's wife and no real partnership between them, and that taxpayer earned the partnership profits credited to the wife's account.

This presents no specific legal question except as to whether in this particular case there was any substantial basis in the evidence to warrant the Tax Court's conclusions. And it presents no "conflict among the Circuits, or constitutional questions, or a clear cut mistake of law of real importance," which this Court has recently laid down as the requisites for review by this Court (*Bingham Comm.* June 4, 1945, Adv. Op. Vol. 89, No. 16, p. 1191).

The provisions of the Revenue Code and Regulations set forth by counsel (Pet. 2, 3) are not here, and were not before the lower courts, in controversy. No one in this case has yet questioned their meaning, or their applicability.

No one has questioned the facts found by the Tax Court. We adopted the Tax Court's findings of fact in the Circuit Court of Appeals, and based our entire appeal on those findings. On the basis of those findings (and on the basis of anything else which can be found in the record) "there was no warrant in the record" (*Dobson v. Comm.*, 320 U. S. 489; *Bingham's Trust v. Comm.*, June 4, 1945, 89 Adv. Op., p. 1191), and there was not "substantial basis in the evidence" (*Commissioner v. Scottish Am. Co.*, 323 U. S. 119) to support the Tax Court's Conclusions. The Circuit Court of Appeals was therefore called upon to reverse, and it did reverse, the Tax Court.

Surely counsel do not ask this Court to establish a new principle of law and one contrary to the present Revenue Laws which permit (and under the gift and estate tax laws encourage) husbands to make gifts to their wives, and which permit persons, including husbands and wives, to carry on business under various legal entities, including limited partnerships, general partnerships, corporations, and unincorporated associations. And, surely, Counsel do not ask this Court to hold that in any case involving a gift from a husband to a wife, or involving a partnership in which a husband and wife are members, the Tax Court can, *regardless of the facts*, preclude a review by an appellate court merely by making a final finding, not based on evidence, that a gift was not bona fide and complete, that the husband retained the economic benefits of that gift, that a partnership was not bona fide, or that the husband — and not capital — earned the income.

It is only on such theories that the decision in the instant case is subject to reversal — theories which have already been expressly repudiated by this Court in the

recent case of *Bingham's Trust v. Comm.* (June 4, 1945) supra, in which this Court said:

> "Hence the statute does not leave the Tax Court as the final arbiter of the issue whether its own decisions of questions of law are right or wrong. That can only be ascertained upon resort to the prescribed appellate process by a consideration of the merits of the point of law involved, and by its decision at the conclusion of the process, not before it begins. The fact that the Court of Appeals below, while accepting the Tax Court's findings of fact, has nevertheless reversed its decision, would seem not to leave the question of law decided so free from doubt that the mandate of the statute could rightly be disregarded on any theory. If review were to be denied in this case, it would be difficult to say that any construction of a taxing statute by the Tax Court would be subject to appellate review."

In the instant case, the Circuit Court of Appeals properly reversed the Tax Court for its error of law in arriving at conclusions having no substantial basis in the evidence.

To reverse the instant case, this Court would have to find that there was "warrant in the record" (*Dobson v. Comm.*, 320 U. S. 489) to sustain the decision of the Tax Court, or it would have to find that there was a "substantial basis in the evidence" to support the Tax Court's conclusions (*Commissioner v. Scottish Am. Co.*, 323 U. S. 119). These findings would have to be predicated on evidence *in the instant case* and not in some other case or cases claimed by the Commissioner to be now pending. A decision by this Court in the instant case would therefore be no guide and would not be controlling in any other case.

Instant Case Not Controlling In Any Other Case

The Commissioner claims that the instant case involves "complex questions" which are not present in the Doll case (Pet. 13, footnote); that there are now pending in

the various courts 280 cases involving more than $5,000,000 in taxes (Pet. 18, 19); and that a decision by this Court in the instant case will "serve as a basis for resolving pending, as well as future, cases and alleviate the administrative and judicial burdens which the widespread creation of family partnerships is causing" (Pet. 19).

The Commissioner must be using language employed by him in some other case involving grave constitutional questions or fundamental principles in the law of taxation. He fails to point out what are the "complex questions", or in what possible way a decision in the instant case can possibly be a basis for decisions in any pending or future cases. The most casual reading of the Tax Court's Findings of Fact and the opinions of the Tax Court and of the Circuit Court of Appeals will make it apparent that a decision by this Court in the instant case will be of no value in any other case because the instant case depends on its own peculiar facts.

The Commissioner has failed to point out any question of law, either simple or complex, new or old, on which different Circuit Courts of Appeal have come to different conclusions or which is involved in any other case now pending, the solution of which the Commissioner claims would be easy if the present case were reviewed.

The Commissioner tries to make it appear that the "question presented" is of general importance because of the considerable number of partnership cases now pending before the courts. It might be argued with equal logic that every case involving corporations, or involving trusts, or involving gifts, should be reviewed by this Court because of the large number of cases which fall within these general categories. It was recognized both by the Court below, in its opinion in the instant case, and by the Tax Court in the recent decisions in *Davis B. Thornton*, 5 Tax Court No. 13 (May 22, 1945), that each family partnership case depends on its own facts, such as the completeness of the prior gift of corporate shares, the provisions of the partnership agreement covering the wife's control over her share, whether the partnership involved merely personal services of a particular partner or whether

capital was an important income producing factor, whether the books of account were regularly maintained on a partnership basis, and whether her distributive shares of the profits were actually credited and made available to the wife free from the domination or control of the husband.

The Commissioner has failed to show in any way that any of the various family partnership cases now in litigation involve facts or questions similar to those in the instant case. If they were similar, they would still have to be decided on their own facts, and in line with legal principles already established by this Court in the Dobson, Scottish American, and Bingham cases, and in line with established legal principles (not here in dispute) as to what constitutes a valid gift and a valid partnership for tax purposes.

If Instant Case Calls for Review, All Cases Call for Review

If this Court is called upon to pass upon the only question here involved, viz., was there "warrant in the record", or "substantial basis in the evidence" to sustain the decision of the Tax Court, then, in fairness to other taxpayers, as well as in fairness to the Commissioner, this Court should review all of the 280 partnership cases now claimed to be pending because each and every one of these cases, while involving the same admitted legal principles of "warrant in the record" and "substantial basis in the evidence" will depend for its solution on its own particular facts.

II.

Decision in Tower Case Not in Conflict with Decisions in Other Circuits

It is elementary that "out of the facts the law arises, and the facts, together with the law, bring forth the right."

The instant case involves the validity of a gift and of a limited partnership organized under the Michigan law. There has at no time been a disagreement between counsel or between counsel and the lower courts as to the legal requirements of a gift or a limited partnership. The only question here involved has been and is whether under the undisputed facts as found by the Tax Court (and as found in the record), the legal requirements have been fully met, and whether there was any substantial basis in the evidence that, notwithstanding the fullfillment of legal requirements, either the gift or the partnership were a mere sham so that the substance, rather than the form, of the transaction viewed as a whole, constituted what would, in effect, be a tax fraud, something which, by the way, the Commissioner never charged nor attempted to prove.

The Commissioner claims that the decision in the Tower case is in conflict with the decisions in family partnership cases from other circuits. There is no conflict as far as any principle of law is concerned. The cases from other circuits in which family partnerships were not sustained involved different facts, on the basis of which facts a different conclusion was reached. In all of such cases the Circuit Court of Appeals found that the findings of the Tax Court had "warrant in the record", or had "substantial basis in the evidence", as required by the Dobson, Scottish American and Bingham cases.

The Commissioner claims (Pet. 10-12) that in nine cases the decisions in other circuits conflict with the decision in the instant case.

Five of these cases (*Earp v. Jones*, 131 Fed. (2d) 292; *Mead v. Commissioner*, 131 Fed. (2d) 323; *Waldburger v. Helvering*, 131 Fed. (2d) 598; *Tinkoff v. Commissioner*, 120 Fed. (2d) 564, and *Doll v. Commissioner*, 149 Fed. (2d) 239) involved income resulting from *personal services* (as distinguished from capital) such as salesmen's and insurance commissions, accountant's fees, etc. It has consistently been held, and rightly so, that a man cannot make future return of income from his own personal services taxable to his wife or anyone else (*Lucas v. Earl*, 281 U.S. 111; *Burnet v. Leininger*, 285 U.S. 136; *Helvering v. Eubank*, 311 U.S. 122).

The other four cases are clearly different in their facts from the instant case.

In *Lusthaus v. Commissioner*, 149 Fed. (2d) 232, the Circuit Court for the Second Circuit found (though there was a strong dissenting opinion) that there was "substantial evidence" to support the Tax Court's conclusions, in that "it could be inferred from the evidence, there was no real contribution of capital by the wife". As the Court pointed out, the Tax Court had found, as facts, that both the purported sale from the taxpayer to his wife of an interest in the business, and the organization of the purported partnership, were not effective until approximately the middle of the taxable year involved (1940) although ante-dated to the beginning of the year; that the wife's contribution of capital consisted solely of a check for $50,253.81 and eleven promissory notes made payable to her husband in $5000.00 annual installments over an eleven year period; that the check of the wife was delivered to her husband shortly after she had received a check from him in the amount of $50,000; and that until "some time in 1940" the husband and wife had maintained a joint bank account. Primarily on the basis of these findings, which the taxpayer's attorney conceded to be substantially correct, the majority of the reviewing court held that "the circumstances surrounding the $50,000 incident, with the money immediately returned to the petitioner, could be construed as indicating that the latter had not divested himself irrevocably of the subject matter of the gift." Moreover, the Tax Court found that during the taxable year involved the husband had withdrawn $4604.76 from the business as against $59.61 withdrawn by the wife, and the husband had continued to file social security tax returns as owner of the business.

In the Grant and Strong cases (July 19, 1945 Prentice-Hall 1945 Par. 72,626) the wives returned to the partnership all distributions except the portions necessary to pay income taxes on them; the distributions were placed in joint bank accounts with the husbands so that the latter retained control of them; the husbands continued to do business as "Strong & Grant, a copartnership consisting of Ernest A. Strong and Joseph W. Grant acting as joint

contractors and co-adventurers", and under the partnership agreements, the wives' interests were subject to be sold without their having any choice in fixing or obtaining a fair purchase price. It was properly held that the husbands continued to control and enjoy "the same economic benefits they would have realized had they retained unqualified ownership of such assets and income."

In *Argo v. Commissioner* (C. C. A. 5th — June 20, 1945 — Prentice-Hall, Par. 72,588) the partnership arrangement was purely oral; there was no deed, bill of sale or any other written form of conveyance transferring any interest to the wife and minor children, in statements to his bank and in paying taxes the husband designated himself as the owner of the business, and there was evidence that the earnings of the husband were approximately 50% of the physical assets of the business so that capital was not the major income producing factor.

It may also be mentioned, in passing, that the Circuit Courts of Appeal, in deciding the Grant, Strong and Argo cases, did not even deem it necessary to mention, though they must have been cognizant of, the instant case decided April 2, 1945.

The Tax Court itself (Judge Harron dissenting) has distinguished cases like *Earp v. Jones* and *Mead v. Commissioner*, supra, on the ground that they involve personal service businesses, the income from which is attributable to the persons rendering the services. (*M. W. Smith, Jr.*, 3 *Tax Court*, 894, 905; *Robert B. Scherer*, 3 *Tax Court*, 776, 793; *J. D. Johnson, Jr.*, 3 *Tax Court*, 799, 809).

In the recent case of *Davis P. Thornton*, 5 Tax Court, No. 13, the Tax Court (Judge Harron again dissenting) gave consideration to the decision of the Circuit Court of Appeals in the instant case and found no difficulty in distinguishing the Lusthaus and Mead cases (cited by the Commissioner as creating a conflict) from the instant case. The Tax Court also reaffirmed the right of a husband to make a gift to his wife even if it is done for the purpose of saving taxes, by saying:

> "No case, we think, goes so far as to deny the right to make gifts of property, even though the re-

sult is a division of income in accordance with ownership thereof. Helvering v. Horst, 311 U. S. 112. The right to make gifts of one's property is no attenuated subtlety. * * * Mere purpose to avoid tax does not in itself vitiate a transfer of property."

III.

Instant Case Not In Conflict With Decisions Of This Court

Petitioner claims that "the decision of the court below conflicts in principle with decisions of this Court on related issues" viz.: that ownership for tax purposes is not circumscribed by refinements of legal title; that taxation is concerned with economic realities; that command over or enjoyment of property marks the real owner for tax purposes; that tax consequences flow from substance rather than form; that a legal entity which is a sham may be disregarded; that he who earns the income cannot escape taxation by procurring payment to another; that the Tax Court is entitled to view separate steps as a whole; and that the Tax Court's conclusion as to the substance of a transaction is conclusive if supported by evidence (Petition 13-15). We have at no time disputed any of these principles. We agree with them, and the Circuit Court of Appeals followed them. But there was no warrant in law and no substantial basis in the evidence, in the light of such tests, to justify the Tax Court's decision.

The Commissioner would not enumerate all these general and well known rules if he really had some specific legal principle on which he could rely, and on which he sought review.

The nearest counsel come to being specific is when, in their petition, they say:

> "The decision, below, contrary to the principle laid down by this Court in Dobson v. Commissioner, fails to give effect to findings of the Tax Court which make it clear that taxpayer controlled the distribution of partnership income to his wife. It is clear that tax-

payer could determine the time for and manner of disposition of partnership profits for, as the Tax Court found under the partnership agreement, taxpayer and Amidon (the third partner) were authorized to make these determinations and taxpayer's decision controlled if they failed to agree, since he was the majority of the general partners in capital interest. Other findings of the Tax Court reflecting taxpayer's complete control of the business make it apparent that the production of partnership income depended upon his will. In a real sense, therefore, the partnership earnings were subject to his disposition" (Petition, page 17).

The taxpayer's control of salaries and the distribution of partnership profits was in accordance with the Michigan Uniform Limited Partnership Law which entrusts the active management of such a partnership to the general partners by expressly providing in Sec. 4 that "The contributions of a limited partner may be cash or property, *but not services.*" (Michigan Uniform Limited Partnership Act; Par. 20.54 Mich. Stats. Anno.) And the husband's control over the partnership interest of his wife was no different than it would have been if the wife had been a total stranger. His control was also no different than is the control exercised by a majority stockholder in a corporation, through his elected board of directors, over the payment of salaries and the distribution of dividends.

The husband, as the controlling general partner, did have control of the management of the partnership business, but that control did not at any time, nor in any way, give him the right to divert to himself one cent of the wife's capital interest or of the share of earnings which, under the partnership agreement, belonged to the wife. And he never did divert either one cent of that capital or of those earnings to himself. She withdrew substantial portions of her earnings, and the portion of her earnings which were not withdrawn but which were left in the business, were at no time available to her husband. They were available, as were the undrawn earnings of the husband, as working capital, to carry on the business for the bene-

fit of all the partners, with the husband having and exercising no authority whatever to divert or in any way obtain for himself the economic benefits of the wife's share.

The Tax Court has held that such limited partnerships, as between husband and wife, are entitled to full recognition for tax purposes, and the Commissioner of Internal Revenue has announced that he acquiesces in such decisions. (*Glensder Textile Co.*, 46 B.T.A., 176; Acquiescence 1942 — 1 cum. Bul., p. 8) To same effect see *Sidney Nathan, et al.*, T. C. Memo. of May 14, 1943; *Taywall, Ltd.*, T. C. Memo. Op. of July 20, 1942.

We challenged government counsel in the Circuit Court of Appeals to find anything in the testimony anywhere (or in the Tax Court's Findings of Fact) which bears out the statements of Judge Harron of the Tax Court that:

> "petitioner did not intend to make a gift of the stock he did not intend to divest himself of such title, dominion and control of the stock as was necessary to constitute a good and valid gift thereof in praesenti, the transfer was not such that the entire dominion and control of the gift was in the wife" (R. 23), and the husband was "the person who earned the income which was credited to the wife's account" (R. 28).

Counsel did not meet, and made no attempt to meet, this challenge, though we made it in our briefs and on the oral argument before the Circuit Court of Appeals. When counsel failed to meet the challenge, we challenged the Circuit Court of Appeals to find anything in the record anywhere which would bear out Judge Harron's statement or from which an inference could be drawn that there was any "warrant in law" or "substantial basis in the evidence" to support the Tax Court. It will be noted that Judge Martin, in his dissenting opinion in the instant case (R. 87), did not meet, and did not attempt to meet, this challenge.

Conflict of Decisions, if one exists, is in Tax Court

The only conflict we have been able to find in husband and wife partnership cases is that which appears in the varying views of the sixteen members of the Tax Court itself, expressed, for instance, in six different opinions in the recent case of *Camiel Thorrez*, (May 21, 1945), 5 Tax Court No. 8.

Since the Tower case was decided, the Tax Court, in cases depending on their own facts but not varying greatly from the facts in the instant case, has sustained husband and wife partnerships:

Robert P. Scherer, 3 Tax Court 776;
J. D. Johnston, Jr., 3 Tax Court 799;
Felix Zukaitis, 3 Tax Court 814;
M. W. Smith, Jr., 3 Tax Court 894;
Davis B. Thornton, 5 Tax Court No. 13.

The instant case was heard and decided by Judge Harron of the Tax Court, without review by the whole court. Since the instant case was decided, the five cases above cited have all been decided in favor of the taxpayer, after review by the whole Court, Judge Harron in each case dissenting. In all except the Thornton case, only recently decided, the Commissioner has announced his acquiescence, thus showing that there is no novel question of law presented but merely a matter of applying admitted legal principles to the facts of each case.

Weight of Tax Court Decisions

This Court, in the Dobson case, has referred to decisions of the Tax Court as being "characterized by substantial uniformity", and as being entitled to great weight and not subject to review if they have "warrant in the record" and "a reasonable basis in law". This Court has also said in concurring opinion in the more recent Bingham's Trust case that while "the interpretation of tax statutes and their application to particular circumstances are all matters peculiarly within the competence of the Tax Court, on the other hand, constitution-

al adjudication, determination of local law questions and common law rules of property such as the meaning of a general power of appointment, or the application of the rule against perpetuities, are outside the special province of the Tax Court."

There might well have been included in the latter category questions of what constitutes a gift, a limited partnership, or what constitutes the beneficial use, as distinguished from the ownership, of the legal title to real or personal property. These, too, involve common law rules of property, and they involve no "interpretation of tax statutes." As we have already indicated, the provisions of the Revenue Code and Regulations set forth on pages 2 and 3 of the petition are not here, and were not before the Tax Court or the Circuit Court of Appeals, in any way in controversy. No one in this case has ever questioned either their meaning or their applicability.

IV.

The Instant Case Was Correctly Decided By The Circuit Court of Appeals

The Tax Court based its decision in the instant case on the conclusion: (1) that the gift of the corporate stock to the wife was not valid and complete as the result of which she made no capital contribution to the partnership and she was therefore not a bona fide partner; (2) that the dissolution of the corporation and the formation of the partnership fulfilled no business purpose other than the saving of taxes to petitioner (R. 25); (3) that there was no real partnership between the husband and wife for the conduct of a business enterprise; and (4) that petitioner was the person who earned the income which was credited to the wife's account (R. 28).

Petitioner refers to the foregoing as "findings" (Pet. 18). They are, however, merely ultimate conclusions, for which there is no substantial basis in the evidence, or in the specific Findings of Fact.

Out of the facts the law arises, — and in the instant case (1) the facts were undisputed: (2) the facts were found by the Tax Court in its specific findings of fact; (3) we relied and now rely on those findings; and (4) we contend that on the basis of those findings of fact there is no "warrant in the record" and there is not "substantial basis in the evidence" to support the Tax Court's conclusions.

No one, either counsel or court, has yet been able or has even attempted to point out anything anywhere in the findings of fact, *or in the record in this case,* from which an inference can be drawn that the gift was not complete and bona fide, that the partnership was not legally organized and carried on in absolute good faith, that the husband retained the economic benefit of that which he gave to his wife, or that her share of the partnership profits were not derived from the use of capital but were the result of her husband's individual efforts.

We suggest that the Judges of this Court, in their consideration of the petition for certiorari, read the Tax Court's findings of fact (R. 15), the Tax Court's opinion (R. 21), and the opinions of the Circuit Court of Appeals (R. 82). Nothing further should be needed to convince this Court that this case has now been correctly decided and that a further review is unnecessary.

Respectfully submitted,

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